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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
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8 UNITED STATES OF AMERICA, *ex rel.*
9 CECILIA GUARDIOLA,

Plaintiff/ Relator,

10 v.
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12 RENOWN HEALTH, RENOWN REGIONAL
13 MEDICAL CENTER, and RENOWN SOUTH
MEADOWS MEDICAL CENTER,

14 Defendants.
15

Case No. 3:12-cv-00295-LRH-CLB

ORDER

16 Before the court is relator Cecilia Guardiola's motion to award her a share of the proceeds
17 recovered administratively and separately by the United States from defendants Renown Health,
18 Renown Regional Medical Center, and Renown South Meadows Medical Center (collectively
19 "Renown"). ECF No. 231. The United States ("the Government") filed a response (ECF No. 232),
20 and Guardiola replied (ECF No. 235). Guardiola argues that the court should award her a share of
21 the proceeds recovered separately by the Government via the Recovery Audit Contractor ("RAC")
22 and/ or the Medicare Administrative Contractor ("MAC"), as they constitute an "alternate remedy"
23 under the False Claims Act, 31 U.S.C. § 3730(c)(5), ("FCA" or "the Act"). The Government argues
24 that these proceeds are not an alternate remedy because the RAC audits began in 2010, two years
25 before Guardiola brought her *qui tam* suit, and because the Government's recovery did not entirely
26 moot or preclude Guardiola's *qui tam* suit. The court agrees with Guardiola; it therefore grants her
27 motion and awards her \$1,021,448.52, which represents a 29% share of the recovered
28 \$3,522,236.27, as stipulated to by the parties.

1 **I. BACKGROUND**

2 On June 1, 2012, Guardiola filed this *qui tam* action alleging that Renown “defraud[ed]
3 government-funded health insurance programs” through improper billing, in violation of the FCA,
4 31 U.S.C. § 3729 *et seq.* ECF No. 107 at 2-3. Pursuant to 31 U.S.C. § 3730(b)(2), Guardiola filed
5 the complaint under seal, and it was served upon the United States for review. The Government
6 extended the 60-day time period for review several times, ultimately declining to intervene in the
7 action in mid-September 2013. Guardiola filed an amended complaint in January 2014 (ECF No.
8 17), which was served on Renown (ECF No. 18).¹

9 “To supplement CMS’s [Centers for Medicare and Medicaid Services] efforts to protect
10 the fiscal integrity of the Medicare program, Congress enacted the RAC program. Congress told
11 the Secretary [of the Department of Health and Human Services] to conduct a demonstration
12 project using RACs to ‘identify underpayments and overpayments and recoup overpayments under
13 the Medicare program.’” *Palomar Medical Center v. Sebelius*, 693 F.3d 1151, 1156 (9th Cir. 2012)
14 (quoting Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”),
15 Pub.L. No. 108-173, § 306(a), 117 Stat. 2066, 2056 (2003)). This demonstration project ran from
16 March 2005 to March 2008 and culminated in “RACs successfully correcting more than \$1 billion
17 in improper Medicare payments.” *Id.* at 1157. Given this success, “Congress made the RAC
18 program a permanent part of the Medicare Integrity Program and expanded its coverage to all
19 states.” *Id.* (citing 42 U.S.C. § 1395ddd(h)(1), (3)).

20 Beginning in October 2008, HDI was awarded the contract for RAC Region D, and with
21 the CMS’s approval, “performed patient status reviews, which may have included services billed
22 by Renown.” ECF No. 231-2 at 5; ECF No. 231-4 at 7. The Government’s records show that HDI
23 began sending Renown document requests pertaining to these reviews in 2010. *See* ECF No. 232-
24 2. The record provides that HDI’s RAC contract was an “options years” contract—there were
25 series of 1-year contracts that ran from 2008 to 2018, which CMS had the option of canceling or
26 extending each year (though it always renewed the contract). ECF No. 231-2 at 6, 8; ECF No. 231-
27 4 at 7. The RAC’s contract was in part governed by the Statement of Work, which, in relevant part,

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¹ A Second Amended Complaint was filed in January 2015. ECF No. 107.

1 provided that the RAC was to prevent overlap with other contractors, CMS, OGC, DOJ, OIG, and/
2 or other law enforcement entities performing potential fraud reviews. *See* ECF No. 231-5. To
3 ensure that more than one entity did not review a claim, the RAC reviewed the “RAC data
4 warehouse” to see if a claim was “excluded” (another entity was reviewing, or had reviewed, the
5 claim) or suppressed (the claim was not to be reviewed). ECF No. 231-4 at 9. CMS additionally
6 had the power to stop an audit by contacting the RAC (ECF No. 231-4 at 12), and it could issue a
7 “stop-work order” which prevented the RAC from performing certain audit activities, including
8 “issuing additional requests for medical records to a provider or issuing additional improper
9 payment notifications,” (ECF No. 231-2 at 7). CMS could also effect a “litigation-hold,” which it
10 did in November 2017 in regards to this litigation. ECF No. 231-2 at 20. As stipulated to by the
11 parties, during the pendency of Guardiola’s *qui tam* suit, the Government recovered \$3,461,612.56
12 from Renown via the RAC.² ECF No. 221 ¶ 3.

13 Guardiola and Renown eventually reached a settlement agreement in her *qui tam* suit in
14 July 2016, resulting in a \$9.5 million dollar award to the United States, and a stipulated dismissal
15 of Renown with prejudice. ECF Nos. 182 & 183. Guardiola, as the relator in this *qui tam* action,
16 was awarded a 29 percent share of this settlement recovery, amounting to \$1,707,324. ECF No.
17 183-1 at 3. During her *qui tam* suit, Guardiola discovered that the Government had already
18 recovered a portion of the covered conduct of her *qui tam* suit via the RAC and MAC. Therefore,
19 she did not pursue these proceeds in her settlement with Renown and reserved the right to claim a
20 relator’s share of these proceeds as an “alternate remedy.” ECF No. 180; ECF No. 183-1 at 6.

21 Following the settlement, Guardiola motioned this court for a share of the alternative
22 remedy. ECF No. 179. The United States did not directly respond to this motion, but instead moved
23 for leave to file an *amicus curiae* brief in opposition. ECF No. 184. On September 14, 2016, the
24 court ruled it lacked jurisdiction to determine Guardiola’s proceeds because the Government was
25 not a party to the original action. ECF No. 190. When Guardiola moved to amend her complaint
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27 ² As provided by the parties, because the proceeds recovered by the MAC were “miniscule” in comparison
28 to those recovered by the RAC, the parties reference only the RAC, though they stipulated that the total
amount recovered and at issue in the instant motion (\$3,522,236.27) included proceeds recovered by both
the RAC and MAC. *See* ECF No. 231 at 4 n.2.

1 (ECF No. 191), the court ruled that because sovereign immunity would bar her claim, amendment
2 was futile (ECF No. 197).

3 Guardiola appealed these rulings to the Ninth Circuit (ECF No. 198), where the
4 Government reversed its position and asserted that the FCA acts as a waiver of sovereign immunity
5 (*see United States of America ex rel. Cecilia Guardiola v. Renown Health and United States of*
6 *America (Intervenor)*, No. 16-17205, Dkt 22-2 (9th Cir. 2017)). Guardiola then moved this court
7 to issue an indicative ruling under Rule 62.1 (ECF No. 204), which the court granted (ECF No.
8 206). Shortly thereafter, the Ninth Circuit remanded the matter to this court for the limited purpose
9 of enabling the court to consider Guardiola's 60(b) motion (ECF No. 207), and this court vacated
10 its prior rulings (ECF No. 208). Guardiola then voluntarily dismissed her appeal. ECF No. 209.

11 The court allowed limited discovery to be conducted on Guardiola's alternate remedy
12 theory. ECF Nos. 220 & 224. In relevant part, the parties also stipulated to the following facts:

13 6) The amounts described in paragraphs B.3 and B.4 represent all overpayments
14 recovered by the United States for Inpatient Billing Practices from RAC Recoveries
15 and MAC Recoveries at issue in Relator's "alternate remedy" claims. But for being
16 recovered by the United States as RAC Recoveries or MAC Recoveries, these
17 amounts would have been recoverable as Covered Conduct as part of the Settlement
18 Agreement. Because these amounts were recovered separately by the United States
19 as RAC Recoveries or Mac Recoveries, they were excluded from the Covered
20 Conduct, Settlement Amount and Settlement Agreement.

18 7) In the event Relator prevails on her "alternate remedy" claims,

- 19 a. the value of funds recovered by the United States for Inpatient Billing
20 Practices as an "alternate remedy" under the False Claims Act will equal
21 \$3,522,236.27;
22 b. the value of the amount to be paid by the United States to Relator will be
23 \$1,021,448.52, which represents a 29% share of this amount; and
24 c. the amounts provided in this paragraph 7 will be the amounts awarded in any
25 judgment entered by the Court in favor of Relator on her "alternate remedy"
26 claims.

23 ECF No. 221 at 4.

24 Guardiola again filed a motion for share of the alternate remedy, the instant motion. ECF
25 No. 231. She argues that these proceeds were recovered after she commenced her *qui tam* action.
26 She argues that because these proceeds would have been recoverable in her *qui tam* suit *but for*
27 having been recovered by the Government through the RAC and/or MAC, the proceeds constitute
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1 an “alternate remedy” under the FCA. Of which, she argues, she is entitled to the same 29 percent
2 share as she received in her initial suit.

3 The United States filed its response, arguing that the overpayments recovered from
4 Renown via the RAC process did not constitute an “alternate remedy” under the FCA. ECF No.
5 232. The Government argues that because the RAC began its audit in 2010, two years prior to
6 Guardiola commencing her *qui tam* suit (“pre-existence”), and because the RAC recovery did not
7 entirely preclude or fully release or moot Guardiola’s suit, it cannot constitute an “alternate
8 remedy” under the FCA. ECF No. 232 at 9. The Government also motioned the court to seal
9 Exhibit A to its response (ECF Nos. 232 & 233), which the court granted (ECF No. 234).
10 Accordingly, Guardiola then replied. ECF No. 235.

11 Upon review of the instant motion, it became apparent to the court that though the
12 Government had filed a motion to intervene while this suit was on appeal before the Ninth Circuit,
13 the Court did not rule on that motion before the appeal was voluntarily dismissed and the case was
14 returned to this court. *See United States of America ex rel. Cecilia Guardiola v. Renown Health*
15 *and United States of America (Intervenor)*, No. 16-17205 (9th Cir. 2017). Additionally, the
16 Government’s response to the instant motion was docketed as an *amicus* but appeared to be filed
17 as an intervenor. *See* ECF No. 232. Therefore, the court summoned the Government to clarify its
18 position in this case. ECF No. 236. Accordingly, the Government filed a response adopting and
19 incorporating its intervention motion before the Ninth Circuit as its unopposed motion to intervene
20 in the matter before this court. ECF No. 237. With good cause appearing, the court granted the
21 Government’s motion to intervene on February 14, 2020. ECF No. 238.

22 The court now rules on Guardiola’s pending motion to award her a share of proceeds
23 recovered administratively and separately by the United States from Renown.

24 **II. LEGAL STANDARD**

25 “The FCA, 31 U.S.C. § 3729 *et seq.*, is an anti-fraud statute that prohibits the knowing
26 submission of false or fraudulent claims to the federal government.” *U.S. ex rel. Bledsoe v.*
27 *Community Health Systems, Inc.*, 342 F.3d 634, 640 (6th Cir. 2003). “The FCA establishes a
28 scheme that permits either the Attorney General, § 3730(a), or a private party, § 3730(b), to initiate

1 a civil action alleging fraud on the Government.” *U.S. ex rel. Eisenstein v. City of New York, New*
2 *York*, 556 U.S. 928, 932 (2009). If the private individual, known as the relator, brings the *qui tam*
3 suit, he or she must file the complaint under seal and serve it on the Government. 31 U.S.C.
4 § 3730(b)(2). The complaint remains under seal for at least 60 days while the Government decides
5 whether to intervene in the suit. *Id.* The Government may request an extension of the 60-day period
6 with a showing of good cause. § 3730(b)(3). “If the Government elects not to proceed with the
7 action, the person who initiated the action shall have the right to conduct the action.” § 3730(c)(3).
8 If successful, the relator is entitled to a 25-30 percent share of the eventual proceeds recovered, as
9 well as reasonable expenses, attorney’s fees and costs. § 3730(d)(2). If the Government declines
10 to intervene, it “may elect to pursue its claim through any alternate remedy available to the
11 Government, including any administrative proceeding to determine a civil money penalty.”
12 § 3730(c)(5). “If any such alternate remedy is pursued in another proceeding, the person initiating
13 the action shall have the same rights in such proceeding as such person would have had if the
14 action had continued under this section.” *Id.*

15 “In any action brought under section 3730, the United States shall be required to prove all
16 essential elements of the cause of action, including damages, by a preponderance of the evidence.”
17 31 U.S.C. § 3731(d). While the statute is not clear that this standard applies to suits in which a
18 relator seeks a share of an alternate remedy, the court agrees with the parties that a preponderance
19 of the evidence standard is appropriate and uses that standard in reaching its decision. *See Grogan*
20 *v. Garner*, 498 U.S. 279, 286 (1992) (“Because the preponderance-of-the-evidence standard results
21 in a roughly equal allocation of the risk of error between litigants, we presume that this standard
22 is applicable in civil actions between private litigants[.]”).

23 To the court’s knowledge, no court has yet ruled on whether a RAC and/ or MAC audit,
24 which recovers proceeds that would have been covered-conduct recoverable in a simultaneously
25 occurring *qui tam* suit, constitutes an “alternate remedy” under the FCA. The court therefore
26 conducts a statutory interpretation inquiry beginning with “the plain language of the statute.” *U.S.*
27 *ex rel. Barajas v. United States*, 258 F.3d 1004, 1010 (9th Cir. 2001).

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1 **III. DISCUSSION**

2 **The court grants Guardiola's motion.**

3 First, the court addresses what the Government calls the “pre-existence” requirement. The
4 Ninth Circuit determined that, “[a]n alternate remedy under § 3730(c)(5) is a remedy achieved
5 through the government’s pursuit of a claim after it has chosen not to intervene in a *qui tam*
6 relator’s FCA action.” *Barajas*, 258 F.3d at 1010. The Government argues that because the audit
7 process began in 2010, two years before Guardiola brought her *qui tam* action and more than three
8 years before the Government decided not to intervene, the “pre-existence” requirement fails.
9 Guardiola argues that while the audit process may have begun in 2010, the RAC contracts were
10 not a “single, unbroken and unchanging process,” but rather were a series of contracts that could
11 have been stopped or paused by the Government at any time. ECF No. 235 at 3. Additionally, she
12 argues that CMS had control over all RACs and could suppress claims so that the RAC could not
13 review them while other fraud investigations occurred.

14 In considering whether the Government began pursuing the RAC recovery before or after
15 it decided not to intervene, the court looks at the RAC audit process and the relationship between
16 the RAC and CMS. As provided by the record, HDI was awarded the RAC Region D contract in
17 2008 and began sending Renown document requests based on CMS approved new issues in 2010.
18 While the Government argues that HDI was pursuing the same audit of the “inpatient-outpatient
19 New Issue” since 2010, it points to nothing in the record to support this conclusion. The record
20 does not make clear that a document request made in 2010 pertained to the same audit as one made
21 in 2012 or 2013. It appears that the Government is asking the court to find that document requests
22 made regarding one issue in one year and those document requests made in a different year on a
23 potentially new or different issue, pertain to the same continuous audit. The record cannot support
24 such a conclusion. Furthermore, such a conclusion would mean that no relator could ever recover
25 on these types of claims because the Government began auditing providers in 2010 and presumably
26 will continue auditing providers for the foreseeable future.

27 The Government further argues that HDI did not elect to audit Renown beginning in 2012
28 or make the required *choice* to audit Renown after the Government declined to intervene. The

1 court agrees that HDI did not make this choice, however, the record provides that the Government
2 did. Based on the Statement of Work provided to HDI along with each RAC contract, the RACs
3 are to take precautions to ensure that they are not reviewing claims that are either suppressed or
4 excluded. In part, this is to prevent overlap between RACs and CMS, OGC, DOJ, OIG, and/or
5 other law enforcement fraud investigations. The Government argues that even if the Department
6 of Justice (“DOJ”) was aware of the *qui tam* suit (which as the entity that decides whether to
7 intervene in a *qui tam* suit it would have been), no statute imposes a duty on them to stop or
8 interfere with the RAC’s statutorily mandated work. The court disagrees.

9 It is clear from the record that CMS directed the RAC’s actions. In order to prevent overlap,
10 the RAC was required to review the RAC data warehouse to determine whether it could review
11 specific claims and attempt to recover overpayment. However, a review of the data warehouse is
12 only as good as the data input into the data warehouse. If the RACs, CMS, OGC, DOJ, OIG and
13 other law enforcement do not update the data warehouse based on claims they are reviewing and
14 for which they are attempting to recover overpayment, RACs will presumably be interfering with
15 other fraud reviews. To find that the DOJ holds no duty to keep a RAC from interfering in a *qui*
16 *tam* suit in which the Government declines to intervene, when such a suit will involve great
17 expense to the relator, would be counter to the very purpose of the FCA. *See Bledsoe*, 342 F.3d at
18 648 (quoting S. Rep. 99-345 at 23-24, 1986 U.S.C.C.A.N. at 5288-89) (“Congress made it clear
19 that its ‘overall intent in amending [§ 3730] [was] to encourage more private enforcement suits.’”).

20 This reasoning is directly in line with the Ninth Circuit’s reasoning in *Barajas*: “[t]he use
21 of the term ‘alternate remedy’ makes clear that the government must choose one remedy or the
22 other; it cannot choose both.” 258 F.3d at 1010. The Statement of Work makes clear that the
23 Government does not want overlap in investigations and overpayment recovery. Therefore, these
24 contracts do not contemplate a time when the RAC is recovering proceeds that are covered conduct
25 in another fraud investigation or cause of action like Guardiola’s *qui tam* suit.³ This is a logical
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27 ³ *See also Bledsoe*, 342 F.3d at 648 (quoting S. Rep. 99-345, at 27, 1986 USCCAN at 5292) (“Specifically,
28 the Senate Report made clear that ‘[w]hile the Government will have the opportunity to elect its remedy, it
will not have an opportunity for due recovery on the same claim or claims. In other words, the Government
must elect to pursue the false claims action either judicially or administratively and if the Government

1 conclusion—if the Government had intervened, it too would not want to have spent time and
2 taxpayer resources investigating the claims only to find that the RAC had already recovered the
3 funds. To find that a relator is not entitled to the same protections is, again, directly contrary to the
4 plain purpose of the FCA.

5 The Government further argues that section 1395ddd(h)(7) of the Medicare Integrity
6 Program provides that the RAC audits do not impede an FCA suit. The statute provides: “A
7 recovery of an overpayment to [an] individual or entity by a recovery audit contractor under this
8 subsection shall not be construed to prohibit the Secretary or the Attorney General from
9 investigating and prosecuting, if appropriate, allegations of fraud or abuse arising from such
10 overpayment.” 42 U.S.C. § 1395ddd(h)(7). A plain reading of this statute provides that the
11 Government is not precluded from investigating or filing suit against a provider that a RAC has
12 recovered overpayment from if, after recovering payment, the Government determines there may
13 be fraud. Nothing in this statute can be read to say that RAC recovery of overpayment made while
14 a simultaneous *qui tam* suit is pending in which the Government declined to intervene is *precluded*
15 as an alternate remedy.

16 Here, Guardiola filed her suit in June 2012, and in mid-September 2013, the Government
17 declined to intervene. After declining to intervene, the record provides that the Government did
18 not suppress the RAC’s claim review of the covered conduct of Guardiola’s *qui tam* suit, and it
19 did not provide a stop-work order or litigation-hold to the RAC until 2017. The record further
20 provides that from late September 2013 until February 2014, the RAC continued sending
21 document requests to Renown. The court finds these new document requests, which the
22 Government failed to suppress when it had the authority and ability to do so, constituted a pursuit
23 of the claim after the Government had declined to intervene in the *qui tam* suit. Therefore, the
24 “pre-existence” requirement is met.

25 Next, in determining whether recovery by a RAC could constitute an alternate remedy, the
26 court looks again to the Ninth Circuit’s reasoning in *Barajas*. The Ninth Circuit explained:

27 _____
28 declines to intervene in a *qui tam* action, it is estopped from pursuing [sic] the same claim administratively,
or in a separate judicial action.”).

1 The language of § 3730(c)(5) places no restrictions on the alternate remedies the
2 government might pursue. It specifies broadly that the government may pursue
3 “any alternative remedy available to [it]” (emphasis added). The term “any” is
4 generally used to indicate lack of restrictions or limitations on the term modified.
5 See *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999)
6 (“According to Webster’s *Third New Int’l Dictionary* (3d ed. 1986), ‘any’ means
‘one, no matter what one’; ‘ALL’; ‘one or more discriminately from all those of a
kind.’ This broad meaning of ‘any’ has been recognized by this circuit.” (citations
omitted)); *Turner v. McMahon*, 830 F.2d 1003, 1007 (9th Cir. 1987) (“[U]se of the
adjective ‘any’ indicates that Congress intended that overpayments must be
recouped without restriction.”).

7 *Barajas*, 258 F.3d at 1010-11. The Ninth Circuit’s broad reading of the statute therefore supports
8 a finding that RAC and/ or MAC recoveries can constitute an “alternate remedy” under the FCA.

9 The Government next argues that to be an alternate remedy, the effect of the alternate
10 remedy must be to “discontinue, and thereby preclude, the relator’s *qui tam* suit.” ECF No. 235 at
11 14. As the Ninth Circuit noted in *Barajas*, “[i]f the government chooses not to intervene in the
12 relator’s action, but, instead chooses to pursue ‘any alternate remedy,’ the relator has a right to
13 recover a share of the proceeds of the ‘alternate remedy’ to the same degree that he or she *would*
14 *have been entitled* to a share of the proceeds of an FCA action.” 258 F.3d at 1010 (emphasis
15 added). The parties’ stipulation reads: “*But for* being recovered by the United States as RAC
16 Recoveries or MAC Recoveries, these amounts would have been recoverable as Covered Conduct
17 as part of the Settlement Agreement.” ECF No. 281 ¶ 6 (emphasis added). This stipulation
18 therefore provides that had the Government not conducted the RAC and MAC recoveries,
19 Guardiola *would have been entitled* to a 29 percent share of those proceeds in her FCA *qui tam*
20 action. The stipulation language is exactly the situation the alternate remedy provision was
21 designed to protect against: when a relator would have recovered a share of the proceeds in her *qui*
22 *tam* action but for the Government proceeding in a different manner without her, and not sharing
23 those proceeds. See *Barajas*, 258 F.3d at 1012 (“It would be inconsistent not only with the plain
24 meaning of the broad language employed in the statute, but also with the purpose of the statute, to
25 allow the government to obtain from a *qui tam* defendant a remedy that could have been obtained
26 in an already-filed FCA action, and then to argue that the proceeds of that remedy need not be
27 shared with the whistleblower because the remedy was not an ‘alternate remedy’ within the
28 meaning of the FCA.”).

1 The Government argues that to be an alternate remedy, the alternative must have entirely
2 precluded Guardiola from all recovery. The court disagrees—that is not the law of this Circuit.
3 First, the Ninth Circuit’s opinion in *Barajas*, the Circuit’s most precedential case on FCA
4 “alternate remedy” claims, does not support this reasoning. *See id.* While in *Barajas* the relator
5 was ultimately prohibited from pursuing its *qui tam* suit due to the Government recovering
6 alternatively, the Court never held that preclusion is a base requirement to recover on an alternative
7 remedy theory. *Id.* at 1012-13. Second, the Ninth Circuit’s opinion in *United States v. Van Dyck*
8 does not lend support to this reasoning. 866 F.3d 1130 (9th Cir. 2017). *Van Dyck* starts at a different
9 procedural posture than this action—there, the Court was deciding whether a relator could
10 intervene in a criminal proceeding and it did not even reach the conclusion of whether a criminal
11 forfeiture constituted an alternate remedy under the statute. *Id.* at 1135. Additionally, simply
12 because the Court found that “conclusion of the criminal forfeiture action does not preclude
13 Relators from going forward with the *qui tam* action and receiving a portion of the proceeds,” that
14 does not mean that total preclusion is required to constitute an alternate remedy. *Id.* Third, the
15 Government cites to the Fourth Circuit’s opinion in *United States ex rel. LaCorte v. Wagner*, in
16 support of this reasoning. 185 F.3d 188 (4th Cir. 1999). Like *Van Dyke*, *LaCorte* starts from a
17 different procedural posture—there, the Court was deciding whether a relator from a prior *qui tam*
18 suit could intervene in a different relator’s *qui tam* suit. *Id.* at 190. Because this is expressly
19 prohibited under the FCA, the would-be intervenors argued that the new *qui tam* suit was an
20 “alternate remedy.” *Id.* at 191. The Government cites to one portion of the Court’s opinion, in
21 which the Court discusses its alternative reasoning if it were to believe that the FCA permits
22 intervention: “Section 3730(c)(5) assumes that the original *qui tam* action did not continue.” *Id.* at
23 192. The *LaCorte* Court cites to no authority for this reasoning, and therefore, the court respectfully
24 disagrees—the alternative remedy provision does not presume that the *qui tam* suit does not
25 proceed, it simply provides that if the Government does not intervene and proceeds with an
26 alternative remedy, the relator is entitled to a portion of the proceeds recovered.⁴

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28 ⁴ Additional cases cited by the Government on this point are not mandatory authority and the court finds further discussion unnecessary.

1 Finally, in considering whether the RAC and/ or MAC proceeds constitute an “alternate
2 remedy” under the FCA, the court considers whether Guardiola has established that there exists
3 “overlap between the conduct alleged in [her] *qui tam* suit and the conduct” on which the
4 Government recovered with the RAC. *See Bledsoe*, 342 F.3d at 650-51. Again, the court looks to
5 the parties’ stipulation which provides the necessary finding: “*But for* being recovered by the
6 United States as RAC Recoveries or MAC Recoveries, these amounts would have been
7 recoverable as Covered Conduct as part of the Settlement Agreement.” ECF No. 281 ¶ 6. The court
8 finds that because Guardiola would have been able to recover the proceeds recovered by the RAC
9 as covered conduct in her *qui tam* suit, there is sufficient overlap between the two that Guardiola
10 is entitled to recover.

11 The court finds that this conclusion is properly in line with the purpose of the FCA. As the
12 Sixth Circuit noted in *Bledsoe*, Congress “emphasized its belief that ‘[i]n the face of sophisticated
13 and widespread fraud . . . only a coordinated effort of both the Government and the citizenry will
14 decrease this wave of defrauding public funds.’” *Bledsoe*, 342 F.3d at 648 (quoting S.Rep. 99-345
15 at 23-24, 1986 U.S.C.C.A.N. at 5288-89)). *Qui tam* suits are costly, and if the government declines
16 to intervene, the relator takes all the risk and bears all the costs in pursuing the suit. It would be
17 inconsistent with the plain meaning of the broad language of the FCA to allow the Government to
18 obtain recovery from the RAC and/ or MAC processes that would have been recoverable in the
19 *qui tam* action, and then exclude the relator from those proceeds. It would also hinder the purpose
20 of the FCA—relators will be less likely to engage in costly *qui tam* suits if, after years of litigation,
21 they find out their claims have already been recovered by a RAC or MAC and that they are unable
22 to recover. The Government declined to intervene but continued pursuing the same claims via the
23 administrative RAC procedure. This is exactly what the “alternative remedy” provision was
24 designed to prohibit. Therefore, because Guardiola would have been entitled to her relator’s share
25 of the proceeds recovered by the RAC and MAC in her *qui tam* action, the court finds Guardiola
26 is due her relator’s share of these recovered proceeds as an alternate remedy.

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